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**IN THE DISTRICT COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN
APPELLATE DIVISION**

ISLAND BLOCK CORPORATION,)	
)	CIV. APP. NO. 1998-114
Petitioner/Appellant,)	
)	Re: Terr. Ct. No. 96/388
v.)	
DEPARTMENT OF LABOR, HEARING AND)	
APPEALS UNIT, AND RIGOBERTO JIMINEZ)	
)	
Respondents/Appellees.)	
)	

On Appeal from the Territorial Court of the Virgin Islands

Considered May 26, 1999

Filed July 23, 2001

Before: **RAYMOND L. FINCH**, Chief Judge, District Court of the Virgin Islands; **THOMAS K. MOORE**, Judge of the District Court of the Virgin Islands; and **EDGAR D. ROSS**, Territorial Court Judge, Division of St. Croix, Sitting by Designation.

ATTORNEYS:

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Paul J. Paquin, Esq.
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Attorney for Appellee Department of Labor

Kathleen Navin, Esq.
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Attorney for Appellee Rigoberto Jiminez

JUDGMENT ORDER

PER CURIAM.

Appellant Island Block Corporation ("Island Block" or "appellant") brought this appeal seeking review of the Territorial Court's order affirming the Virgin Islands Department of Labor's Decision and Order to reinstate Rigoberto Jiminez ("Jiminez" or "appellee") with back pay. Appellant bases its appeal on several issues. First, it argues that the Virgin Islands Wrongful Discharge Act ("WDA") was preempted by the National Labor Relations Act ("NLRA") and thus the underlying administrative order should be vacated. Second, the appellant argues that the Administrative Law Judge ("ALJ") erred as a matter of law in holding that an employer may not discharge an employee for economic hardship unless it can show some financial loss prior to the termination. In the alternative, Island Block argues that the Territorial Court erred in holding that the ALJ's findings were supported by substantial evidence. We will affirm the Territorial Court's order reinstating the appellee with backpay.

Island Block terminated Jiminez's employment on July 6, 1995 citing economic hardship. Jiminez filed a timely complaint with the Virgin Islands Department of Labor alleging a violation of the WDA. After a hearing, the ALJ concluded Jiminez's termination to be unlawful and ordered his reinstatement with back pay. Island Block filed a petition for review, which the

Territorial Court agreed to hear on October 22, 1996. On November 20, 1997, the Territorial Court affirmed the ALJ's order, holding "that the decision and order of the Administrative Law Judge was supported by the evidence presented." (Territorial Ct. Order, Nov. 20, 1997, at 3.) Island Block filed a timely Notice of Appeal on December 18, 1997 and a hearing was held before this Court on May 26, 1999. This Court has jurisdiction pursuant to 4 V.I.C. § 33.

Appellant's argument that the NLRA preempts the WDA fails based on the Court of Appeals for the Third Circuit's recent decision in *St. Thomas-St. John Hotel & Tourism Ass'n v. Government of the United States Virgin Islands*, 218 F.3d 232 (3d Cir. 2000). There, the Court of Appeals specifically addressed the issue of preemption and found that the WDA "is not preempted by the NLRA." *Id.* at 245. Accordingly, the ALJ's order cannot be vacated on this ground.

Likewise, Island Block's arguments that the ALJ erred as a matter of law and that the Territorial Court erred in holding that the evidence presented was substantial both fail. At the Department of Labor hearing, Mr. Harry Bowman, Island Block's General Manager, testified that it had terminated the appellee's employment due to economic hardship, that there was "[a] lack of sales, a lack of work for [the employees] to do in general. We

are looking at the bottom line, at the job functions, and we had to keep the company economical, keep it viable." (Appellant Opening Br. at 6.) Island Block apparently was attempting to justify its termination of Jiminez within the exception to the WDA that allows an employer to discharge an employee on economic grounds. Section 76(c) of the WDA

nothing in this section shall be construed as prohibiting an employer from terminating an employee as a result of the cessation of business operations or as a result of a general cutback in the work force due to economic hardship, or as a result of the employee's participation in concerted activity that is not protected by this title.

24 V.I.C. § 76(c).

Although Mr. Bowman stated that the company had engaged in a general cutback of its workforce and had discharged seventeen employees in a two and one-half year span, (see Appellant Opening Br. at 5.), the ALJ found that Island Block's workforce actually had only decreased from 47 employees to 43-44 employees during that span. This was insufficient and that Island Block "presented no evidence that it suffered a financial loss or any meaningful evidence of its economic status." (Territorial Ct. Order, Nov. 20, 1997, at 3.) We agree with both the ALJ and the trial judge that an employer must show some evidence of its financial condition. Mere assertions that business was slow, without more, do not constitute economic hardship. Since Island Block failed to meet its burden of proof, the ALJ did not err as

a matter of law by concluding that the appellant was not suffering economic hardship. Moreover, the Territorial Court did not err in affirming the ALJ's findings based on substantial evidence. Accordingly, it is hereby

ORDERED, that the order of the Territorial Court is AFFIRMED.

ENTERED this 23th day of July, 2001.

ATTEST:
WILFREDO MORALES
Clerk of the Court

By: _____/s/_____
Deputy Clerk

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